United States v. *Reisinger*, 128 U. S. 398 (1888), held that the saving clause's use of the words "penalty," "liability" and "forfeiture" required the conclusion that the clause covered criminal statutes. Those words, the Court found, were "used by the great masters of crown law and the elementary writers as synonymous with the word 'punishment,' in connection with crimes of the highest grade." *Id.*, at 402. Thus, the Court agreed with the construction of the clause by Justice Miller, as Circuit Justice, in *United States* v. *Ulrici*, 28 Fed. Cas. 328, 329 (No. 16, 594 (1875)), that those terms "were used by congress to include all forms of punishment for crime." See 128 U. S., at 402–403. In consequence, the saving clause has been held to bar application of ameliorative criminal sentencing laws repealing harsher ones in force at the time of the commission of an offense. See, *e. g.*, *Jones* v. *United States*, 327 F. 2d 867 (1963); *United States* v. *Kirby*, 176 F. 2d 101 (1949); *Lovely* v. *United States*, 175 F. 2d 312 (1949).

Although the general saving clause does not ordinarily preserve discarded remedies or procedures, see *Hertz* v. *Woodman*, 218 U. S. 205, 218 (1910); *United States* v. *Obermeier*, 186 F. 2d 243, 253 (1950), the legislative history of § 7237 (d) reveals that Congress meant ineligibility for parole to be treated as part of the "punishment" for the narcotics offenses for which respondent was convicted. Section 7237 (d) was enacted as part of the Narcotic Control Act of 1956. The statute embodied congressional acceptance of the approach that effective combat against the contagion of drug addiction required the imposition of severe penalties for certain narcotics offenses. Congress therefore enacted lengthy mandatory

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tence would not be left intact by the repealer and his prosecution would "technically" abate under the common-law rule. Thus, the appropriate inquiry is whether parole ineligibility is a "penalty, forfeiture, or liability" for his offense that survives the repealer.

minimum sentences as a means of decreasing both drug addiction and trafficking. See, *e. g.*, S. Rep. No. 1997, 84th Cong., 2d Sess., 5 (1956), H. R. Rep. No. 2388, 84th Cong., 2d Sess., 10 (1956). But Congress believed that longer sentences would not achieve the desired results unless the offender remained imprisoned for his full term.

> "In evaluating the effectiveness of the presently prescribed penalties, it must be recognized that special incentives in our penal system serve to decrease the actual time spent in a penal institution under a sentence imposed by a court. The violator is eligible for parole after serving one-third of his sentence. . . . Available data from the Bureau of Prisons, indicates that a narcotics violator actually serves an average of less than two-thirds of the sentence imposed by the court. This mitigation of the sentence tends to defeat the purposes of [existing legislation] . . . ." H. R. Rep. No. 2388, *supra*, at 10–11.

Accordingly, Congress expressly provided in § 7237 (d) that parole under 18 U. S. C. § 4202 would be unavailable for narcotics offenders.

There are additional reasons for believing that the no-parole provision is an element of respondent's "punishment." First, only an unusual prisoner could be expected to think that he was not suffering a penalty when he was denied eligibility for parole. See *United States* v. *Ross*, 464 F. 2d 376, 379 (1972); *United States* v. *De Simone*, 468 F. 2d 1196, 1199 (1972). For the confined prisoner, parole—even with its legal constraints—is a long step toward regaining lost freedom.[12] An observation made in somewhat different context is apt:

> "It may be 'legislative grace' for Congress to provide for parole but when it expressly removes all

[12] In *Morrissey* v. *Brewer*, 408 U. S. 471, 482 (1972), in determin-

> hope of parole upon conviction and sentence for certain offenses, . . . this is in the nature of an additional penalty." *Durant* v. *United States*, 410 F. 2d 689, 691 (1969).

Second, a repealer of parole eligibility previously available to imprisoned offenders would clearly present the serious question under the *ex post facto* clause of Art. I, § 9 of the Constitution, of whether it imposed "a greater or more severe *punishment* than was prescribed by law at the time of the . . . offense," *Rooney* v. *North Dakota*, 196 U. S. 319, 325 (1905) (emphasis added). See *Love* v. *Fitzharris*, 460 F. 2d 382 (1972); cf. *Lindsey* v. *Washington*, 301 U. S. 397 (1937); *Holden* v. *Minnesota*, 137 U. S. 483, 491–492 (1890); *Calder* v. *Bull*, 3 U. S. (3 Dall.) 386, 390 (1798); *United States ex. rel. Umbenhowar* v. *McDonnell*, 11 F. Supp. 1014 (1934).

Thus, at least where, as in the case of respondent's narcotics offenses, Congress has barred parole eligibility as a punitive measure, we hold that the no-parole provision of § 7237 (d) is a "penalty, forfeiture, or liability" saved by § 109.

III

Respondent emphasizes that Congress completely changed its approach to regulation of narcotics offenses in the 1970 Act, jettisoning the retributive approach of the 1956 law in favor of emphasis in the 1970 Act upon re-

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ing that parole may not be revoked without affording the parolee procedural due process, we observed:

"The liberty of a parolee enables him to do a wide range of things open to persons who have never been convicted of any crime. . . . Subject to the conditions of his parole, he can be gainfully employed and is free to be with his family and friends and to form the other enduring attachments of normal life. Though the State properly subjects him to many restrictions not applicable to other citizens, his condition is very different from that of confinement in prison." (Footnote omitted.)

habilitation of the narcotics offender. He argues that, in light of this basic change, little purpose is served by denying respondent eligibility for parole, indeed that such denial frustrates the current congressional goal of rehabilitating narcotics offenders.

Undeniably this argument has force, but it is addressed to the wrong governmental branch. Punishment for federal crimes is a matter for Congress, subject to judicial veto only when the legislative judgment oversteps constitutional bounds. See *Gore* v. *United States*, 357 U. S. 386, 393 (1958); *Bell* v. *United States*, 349 U. S. 81, 82 (1955). Section 1103 (a) of the 1970 Act and 1 U. S. C. § 109 saved from repeal the bar of parole eligibility under § 7237 (d), and, however severe the consequences for respondent, Congress trespassed no constitutional limits.

The judgment of the Court of Appeals is

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 73-831

Warden, Lewisburg Penitentiary, Petitioner, *v.* Benigno Marrero.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[June 19, 1974]

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, dissenting.

The Court holds that the no-parole provision of the repealed statute, 26 U. S. C. § 7237 (d) (1964 ed., Supp. V), is saved by both the general savings clause, 1 U. S. C. § 109, and the specific savings clause, § 1103 (a), of the 1970 Act. I believe that neither provision can be read to cover postsentencing parole eligibility and I therefore respectfully dissent.

I

Section 109. Parole eligibility, in my view, is not a "penalty" envisioned by, and within the meaning of, the general savings statute, 1 U. S. C. § 109. The purpose and thrust of § 109, the pertinent portion of which was enacted originally in 1871, 16 Stat. 432, is to preclude the technical abatement of a prosecution for an offense that was committed before the criminal statute was repealed. *Hamm* v. *Rock Hill*, 379 U. S. 306, 314 (1964). Quite appropriately, this recognizes that, apart from exceptional circumstances,[1] one who violates the criminal law should not escape sanction if, subsequent to the commission of his criminal act, the law happens to be repealed.

This savings statute, however, is not in line with the traditional common-law rule favoring application of

[1] See, *e. g.*, *Hamm* v. *Rock Hill*, 379 U. S. 306 (1964).

existing law. *United States* v. *Chambers*, 291 U. S. 217 (1934); *United States* v. *Tynen*, 11 Wall. 88 (1871). See *United States* v. *Schooner Peggy*, 1 Cranch 103 (1801); *Bradley* v. *School Board of the City of Richmond*, — U. S. — (1974). The statute has never been applied by this Court other than to prevent technical abatement of a prosecution.[2] Those federal courts that have interpreted the statute's reference to "penalty" to include the terms of the sentence have dealt only with the length of the sentence actually imposed. *United States* v. *Kirby*, 176 F. 2d 101 (CA2 1949); *Lovely* v. *United States*, 175 F. 2d 312 (CA4), cert. denied, 338 U. S. 834 (1949); *Duffel* v. *United States*, 95 U. S. App. D. C. 242, 221 F. 2d 523 (1954); *Maceo* v. *United States*, 46 F. 2d 788 (CA5 1931).[3]

In this case, however, we are faced with a decidedly different situation. Respondent Marrero in no way is seeking to avoid punishment for his criminal act, and he is still fully subject to the service of his sentence. What

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[2] The issue certified and decided in *United States* v. *Reisinger*, 128 U. S. 398 (1888), was only whether a prosecution under a repealed criminal statute survived the repeal. "Penalty" appears to have been used there interchangeably with the concept of criminal liability. See also *United States* v. *Smith*, 433 F. 2d 341 (CA4 1970), cert. denied, 401 U. S. 942 (1971); *United States* v. *Brown*, 429 F. 2d 566 (CA5 1970); *Faubion* v. *United States*, 424 F. 2d 437 (CA10 1970).

[3] In *Kirby* and *Lovely* the courts of appeals construed the general savings clause in connection with repealing statutes' savings clauses that provided for the nonabatement of any "rights and liabilities" under the repealed acts. It is interesting to note that all the cases cited by the Court, *ante*, p. 8, and the Government, Brief for Petitioner 16–17, for the proposition that sentence as well as prosecution survives under the general savings clause, were decided in circuits that subsequently rejected the extension sought by the Government in the present case.

Marrero seeks is merely the opportunity to be *considered* for parole. Eligibility for parole will not free him from his imposed sentence. The decision whether he should be accorded parole lies within the discretion of the Board of Parole. If for any reason the Board feels that parole would not be appropriate for the respondent, it can be denied, and Marrero will remain incarcerated for the term to which he is subject. Moreover, even if parole is deemed appropriate and is granted, respondent still would be subject to the conditions the parole authorities choose to place on his conditional freedom.

As the Fourth Circuit aptly has observed, parole "is not a release of the prisoner from all disciplinary restraints, but is rather merely 'an extension of the prison walls'; and the prisoner while on parole remains 'in the legal custody and under the control of' the Parole Board," *United States ex rel. Rowe* v. *Nicholson*, 78 F. 2d 468, 469–470, cert. denied, 296 U. S. 573 (1935); *Alvarado* v. *McLaughlin*, 486 F. 2d 541, 544 (1973). See also *Marshall* v. *United States*, — U. S. App. D. C. —, 485 F. 2d 1062, 1065 (1973). The "sentence" to be served by respondent is still 10 years, whether or not he is granted parole. Cf. *Anderson* v. *Corall*, 263 U. S. 193 (1923). In short, it is by no means clear to me that respondent Marrero is seeking to be relieved of the obligations of the "sentence" imposed upon him.

By expanding the term "penalty" to include parole eligibility, rather than restricting it to the sentence imposed, the Court, in my view, misconceives the nature of parole ineligibility and extends § 109 well beyond its prior limits. To say that Congress intended parole ineligibility to be a "penalty" under the repealed statute is merely to state the conclusion. The appropriate question is whether Congress intended parole ineligibility to be the

type of "penalty" preserved by the general savings statute. Until today, § 109 has not been read so broadly, and I believe this extension goes beyond the intended narrow anti-abatement reach of § 109. To repeat: § 109 "was meant to obviate mere technical abatement." *Hamm* v. *Rock Hill,* 379 U. S., at 314.

This unprecedented extension of § 109 might be justified, and perhaps made acceptable, if it were possible in any way to conclude that the Court's reading serves to effectuate congressional intent or to promote some valid policy. But the result reached clearly does a disservice in both respects.

As is demonstrated in Part II, *infra,* Congress did not affirmatively intend to save the no-parole provision. And on pure policy grounds, the result reached by the Court is wholly illogical. Presumably, the purposes behind parole ineligibility are to effect a deterrence to the commission of narcotics offenses, and to keep serious drug offenders behind bars for longer periods. By repealing the parole ineligibility provision, Congress rejected any deterrence rationale that had existed. A person who, on or subsequent to May 1, 1971, might anticipate the commission of a drug offense and who is cognizant of the law, knows that he is eligible for parole under 18 U. S. C. § 4202 after service of one-third of his more-than-180-days sentence. The anomalous effect of the Court's action is that it keeps an inmate who is convicted of an offense committed on April 30, 1971, incarcerated for the full length of his term, while his fellow inmate who committed the identical crime on May 2 and who behaved identically in prison, is eligible for release after one-third the time. Surely, disparate treatment of this kind serves only to frustrate the inmate's sense of justice

and to undermine whatever rehabilitative attempts currently are being made.[4]

II

Section 1103 (a). In passing the Comprehensive Drug Abuse Prevention and Control Act of 1970, 84 Stat. 1236, with its specific repealer provisions in §§ 1101 (b)(3)(A) and (b)(4)(A), Congress unequivocally withdrew and rejected the concept of parole ineligibility. It concluded that the criminal process is ill served by a law that removes the incentives and the rehabilitative potential of a parole system. The only reference in the 1970 Act to pre-Act offenders is in the savings provision of § 1103 (a), 84 Stat. 1294, and it precludes abatement only of "prosecutions." Although we pretermitted this precise question in *Bradley* v. *United States*, 410 U. S. 605, 611 n. 6 (1973), the Court clearly distinguished postsentence parole eligibility from the specific terms of the sentence already handed down. I believe this distinction is crucial and that it requires a different result in the instant situation.

In determining whether § 1103(a) bars parole eligibility for pre-Act offenders, the Court should ascertain what Congress intended. While there is no precise legislative history on this question, I think the wording of § 1103(a) and the overall purposes of the 1970 Act preclude the result reached by the Court. Section 1103(a) applies only

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[4] The Solicitor General concedes that granting parole eligibility presents no institutional problems.

"Neither the Bureau of Prisons nor the Board of Parole believes that it would impede the proper performance of their functions if they were required to consider narcotics offenders convicted under the prior statute eligible for parole under 18 U. S. C. § 4202. Such a requirement would not demand the granting of parole to any individual prisoner unless the Board determines that his supervised release from confinement is in the interests of both the prisoner and society." Brief for Petitioner 8.

to "prosecutions." We reached the outer limit of this term in *Bradley*. Certainly the legislative and judicial history of the even broader language of the general savings provision, § 109, hardly supports the extravagant interpretation of § 1103 (a) reached today. In light of the clear history and law under § 109, had Congress wanted to save more than the prosecution itself, it could well have done so in specific terms. Instead, it chose the narrowest possible savings clause. Particularly in light of the fact that the text of the 1970 Act specifically rejects the concept of paroleless sentencing, it is illogical and unwarranted to assume that Congress intended the term "prosecutions" to be read so broadly.

For me there is no ambiguity in § 1103 (a). I would take the limited savings clause at its word. Assuming, *arguendo*, that there is some doubt as to the congressional intent, it is harsh, to say the least, to resolve the doubt in the manner chosen by the Court. In light of the general rule favoring application of existing law, *United States* v. *Chambers*, 291 U. S. 217 (1934), and the general rule favoring construction of ambiguous statutes in favor of criminal defendants, *United States* v. *Bass*, 404 U. S. 336 (1971), I see no other choice than to resolve any doubts in favor of eligibility.

The Court would justify its broad reading of the word "prosecution" by stating that "a pragmatic view of sentencing requires [this] conclusion." *Ante*, p. 5. Needless to say, no authority, legal or otherwise, is cited for this proposition other than the majority's own intuition, and I venture to say that none could be cited. Parole eligibility is determined by a parole board at *its* discretion, and the existence of parole eligibility is either guaranteed by statute or, as in the case of the repealed Act, is denied by statute. One thing is clear: the sentencing judge has no explicit control over the determination. Congress has never instructed district courts to assess sen-

tences according to parole eligibility dates and if in fact some judges do this, it hardly justifies this Court's flat conclusion that parole eligibility is "implicit in the terms of the sentence" and is "thus determined at the time of sentencing." *Ibid.*

Whatever else *Bradley* held, it clearly stated that the parole eligibility determination under 18 U. S. C. § 4202 (as opposed to preclusion of early parole in the terms of the sentence, as in *Bradley*) does not lie with the District Judge, and the determination is "*made long after sentence has been entered and the prosecution terminated.*" 410 U. S., at 611 n. 6.[5] Even assuming n. 6 in *Bradley* did not conclusively decide the instant issue, the Court's opinion renders the words of the footnote a nullity. The majority states that we "could not reasonably be thought to have decided in a footnote a question 'on which' we said in the text, 'we express no opinion,'" *ante*, p. 5. It then goes on to decide that very issue, relying almost entirely on *Bradley* and concluding that "under the teaching of *Bradley*" ineligibility for parole is part of the 'prosecution.'" At the least, *Bradley* precludes the approach taken by the majority. To my mind, it precludes the result reached.

III

Respondent Marrero does not seek release. He seeks only to be treated in the manner Congress now has recognized as appropriate for all criminal offenders, including those convicted of narcotics violations. If a professional

[5] As the Court notes in n. 9, *ante*, p. 6, in *Morrissey* v. *Brewer*, 408 U. S. 471, 480 (1972), we stated that "[p]arole arises after the end of the criminal prosecution, including imposition of the sentence." The fact that the decision might have dealt with release rather than the determination of eligibility does not eliminate the conceptual proposition that parole eligibility is an event separate from sentencing, and I feel that the majority's attempted distinction is not persuasive.

Board of Parole determines that parole is in the best interests of an inmate and of society, Congress has determined that the inmate should be paroled. The Court, in my view, makes a serious mistake in expanding § 109 so drastically, and in interpreting § 1103 (a) contrary to its intent and language, in order to preclude this result. With only one exception,[6] the federal courts of appeals that have considered this issue currently reject the Government's argument.[7] Inasmuch as I believe the Government's position here is incorrect, in terms both of the laws and of policy, I would affirm the judgment of the Court of Appeals.

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[6] *Perea* v. *United States Board of Parole*, 480 F. 2d 608 (CA10 1973).

[7] *United States ex. rel. Marrero* v. *Warden*, 483 F. 2d 656 (CA3 1973); *Alvarado* v. *McLaughlin*, 486 F. 2d 541 (CA4 1973); petition for certiorari pending *sub nom. McLaughlin* v. *Prieto*; *Amaya* v. *United States Board of Parole*, 486 F. 2d 940 (CA5 1973), petition for certiorari pending; *United States* v. *Marshall*, — U. S. App. D. C. —, 485 F. 2d 1062, 1065 (1973). See *United States* v. *Huguet*, 481 F. 2d 888 (CA2 1973) (question pretermitted). See also *United States* v. *McGarr*, 461 F. 2d 1, 4 (CA7 1972); *United States* v. *Stephens*, 449 F. 2d 103 (CA9 1971). The Second Circuit's earlier decision in *United States* v. *De Simone*, 468 F. 2d 1196 (1972), cert. denied, 410 U. S. 989 (1973), cited by the Court in its n. 7, *ante*, p. 3, was referred to in *Huguet*, and "cannot be regarded as controlling." 481 F. 2d, at 891.